the completion of the contract, will be rejected. If the written contract purports to contain the whole agreement, and it is not apparent from the writing itself that something is left out to be supplied, parol evidence to vary or add to its terms is not admissible."

In Naumberg *v.* Young, 44 N. J. Law, 331, 43 Am. Rep. 380, the action was trespass on the case, to recover damages for a breach of an alleged parol agreement between the parties, entered into at the time, or prior to, the execution of a lease of a certain brick factory; and the court held that parol evidence to establish this collateral agreement was inadmissible, for the reason that the written contract purported on its face to be complete and to contain the entire agreement of the parties, and that the parol evidence offered tended to add another term to the agreement, the agreement containing nothing on the subject to which the parol evidence was directed. The opinion in that case reviews a great number of decided cases, and declares, as this court did in Slaughter *v.* Smither, *supra,* that to admit parol proof to add to a written contract in such a case would be entirely to abrogate the rule of the common law that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument.

We find nothing in the case here which takes it from under the control of that rule of the common law, and therefore the judgment complained of is affirmed.

Affirmed.

WARD LUMBER CO. *v.* HENDERSON-WHITE MFG. CO.

Nov. 29, 1907.

[59 S. E. 476.]

1. Writ of Error—Jurisdiction—Showing by Record—Sufficiency.—While the jurisdiction of the Supreme Court of Appeals must affirmatively appear from the record, it does so appear when the court can see that the judgment of the lower court necessarily involves the constitutionality of some statute or draw in question some right under the federal or state Constitution, though the amount involved is less than $300, and the record on a writ of error from a denial of motions to vacate a judgment for plaintiff and quash execution thereon shows appellate jurisdiction, where it appears that the judgment against plaintiff in error corporation was by default after service of process by publication only, and that the notices of the motions pursuant to the express terms of Code 1904, §§ 3451, 3599, stated that the judgment was so obtained, since the notice plainly raised the issue whether section 3225, under which the judgment was obtained, and authorizing publication service where defendant corporation has

no agent or officer in the county of suit, is repugnant to the state Constitution and the fourteenth amendment to the federal Constitution, guaranteeing due process of law, the denial of the motions necessarily implied a ruling that the section is constitutional.

2. Constitutional Law—Corporations—"Person" Under Constitution.—A corporation is a "person" within Const. U. S. Amend. 14, and Const. Va. art. 1, § 11 [Code Va. 1904, p. ccx], prohibiting deprivation of property without due process of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 730.]

For other definitions, see Words and Phrases, vol. 8, pp. 5322-5335; vol. 8, p. 7752.]

3. Same—Due Process—Provision for Publication Service.—Code 1904, § 3225, authorizing service of process on corporations, excepting municipalities and banks, by publication, where they have no agent or officer in the county of suit, is a reasonable exercise of legislative authority, and does not violate Const. U. S. Amend. 14, and Const. Va. art. 1, § 11 [Code Va. 1904, p. ccx], prohibiting deprivation of property without due process of law.

Keith, P., dissenting.

Error to Circuit Court, Wise County.

Action by the Henderson-White Manufacturing Company against the Ward Lumber Company. From a judgment overruling motions to vacate a judgment for plaintiff, and quash execution thereon, defendant brings error, and plaintiff moves to dismiss the writ of error. Motion denied. Judgment affirmed.

Aubrey E. Strode, for plaintiff in error.
Robertson & Wingfield, for defendant in error.

CARDWELL, J. The defendant in error, a corporation organized under the laws of this state, with its home office in Danville, Va., having an alleged cause of action arising in Wise county, Va., against the plaintiff in error, also a Virginia corporation, with its home office in the city of Lynchburg, Va., on the 13th day of February, 1906, filed with the clerk of the circuit court of Wise county its memorandum of suit against the plaintiff in error to recover the sum of $210.94 due on account, which memorandum directed the clerk to "have summons published in Wise News [a newspaper published in Wise county, Va.], and to it was appended this affidavit, to wit:

"State of Virginia, County of Wise, to wit:

"This day personally appeared before me, C. J. Edwards, a notary public for the county and state aforesaid, Julian P. Thomas, Jr., attorney for the Henderson-White Manufactur-

ing Co., and made oath before me in my county that the Ward Lumber Co., Inc., of Lynchburg, Virginia, has no agent or officer in the said county of Wise, on whom legal notice can be served.

"Given under my hand this 13th day of Feb'y, 1906.

"C. J. EDWARDS, Notary Public."

Upon the completion of the publication of the summons, as prescribed by section 3225 of the Code of 1904, the plaintiff in error not appearing, the circuit court of Wise county entered its judgment in favor of defendant in error against plaintiff in error for the amount of the debt sued for, with interest from the date it was alleged to have become payable, and for costs of the suit. On this judgment execution issued and was levied by the sergeant of the city of Lynchburg upon the effects of plaintiff in error, whereupon it on the 17th day of July, 1906, moved the circuit court of Wise county to reverse the judgment, pursuant to the provisions of section 3451 of the Code of 1904, and also to quash the execution issued thereon, pursuant to section 3599 of the Code of 1904, upon the ground that "the judgment was obtained by default and after service of process by publication only, and not by personal service thereof," which motions were overruled.

We are asked to dismiss the writ of error awarded to the said judgment, upon the ground that the amount involved is less than $300; the only error assigned in the petition for the writ of error being that the statute (section 3225 of the Code, supra) under which the suit was brought and maintained is unconstitutional and void, and that the question was not raised nor passed on in the circuit court.

The motion to dismiss is without merit. While the jurisdiction of this court must affirmatively appear from the record, it does so appear when the court can see, as in this case, that the judgment of the lower court necessarily involved the constitutionality of some statute or ordinance, or drew in question some right under the federal or state Constitution. "Any proceeding which necessarily puts their validity in issue, whether it be by demurrer, plea, instruction, or otherwise, is sufficient to give this cuort jurisdiction of the case." Adkins & Co. *v.* City of Richmond, 98 Va. 91, 34 S. E. 967, 47 L. R. A. 583, 81 Am. St. Rep. 705, and cases there cited.

It will be observed that the judgment in this case was by default after service of process by publication only, and both the notice of the motion to reverse the judgment pursuant to section 3451 of the Code, and of the motion to quash the execution issued on the judgment, pursuant to section 3599 of the Code of 1904, state as the ground of the motion that "the judgment was

obtained by default and after service of process by publication only, and not by personal service thereof." The plain meaning and effect of the notice authorized by statute was to put in issue whether or not the statute (section 3225) under which the judgment was obtained is repugnant to the Constitution of the state and the fourteenth amendment to the Constitution of the United States; and, when the motions were overruled, the trial court necessarily reviewed the statute, ruling that it provides for "due process of law," and therefore not repugnant to the Constitution of the state or of the United States.

The error complained of, however, does not arise out of the construction and interpretation of the statute, but is to the ruling of the trial court that the statute is constitutional and valid. In the latter case this court has appellate jurisdiction, regardless of the fact that the judgment is for less than $300, while in the former it would not have the constitutionality of the statute as distinguished from its construction and interpretation being the source of appellate jurisdiction. Hulvey *v.* Roberts, 106 Va. 189, 55 S. E. 585.

Section 3225 of the Code of 1904, supra, after providing that process against, or notice to, a corporation (other than a municipal corporation or a bank) created by the laws of this state or some other state or country, may be served on certain named officers, etc., or in any case, if there be not in the county or corporation wherein the case is commenced any other person on whom service can be had, as aforesaid, on any agent of the corporation against which the case is, or on any person declared by the laws of this state to be an agent of such corporation, reads as follows: "And if there be no such agent in the county or corporation wherein the case is commenced and affidavit of that fact, and that there is no person in said county or corporation on whom there can be service aforesaid, publication of the process once a week for four successive weeks in a newspaper printed in this state shall be a sufficient service of such process or notice."

Section 11 of article 1 of the Constitution of Virginia [Code Va. 1904, p. ccx], and the fourteenth amendment to the Constitution of the United States, provide "that no person shall be deprived of his property without due process of law."

In determining whether or not, in a particular case, this constitutional provision is being violated, or has been violated, it is uniformly held "to include private corporations, such corporations being persons within the meaning of the fourteenth amendment." C. C. & A. Ry. Co. *v.* Gibbs, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. Ed. 1051.

While this statute has been in force for nearly a quarter of a century, and several times amended (Acts 1885-86, p. 141, c. 146; Acts 1893-94, p. 614, c. 565; Acts 1895-96, p. 445, c. 416), it has

never come under review in this court, except in the case of Wytheville Ins. Co. *v.* Stultz, 87 Va. 629, 13 S. E. 77, and there the constitutionality of the statute was not called in question; the question decided being whether the defendant was a banking corporation, and therefore exempt from the operation of the statute, or to be regarded as an insurance company and the court held that it was both a banking and an insurance company, and not a banking corporation, and therefore the service by publication of the summons as provided by the statute was good.

In Violett *v.* City of Alexandria, 92 Va. 567, 23 S. E. 909 (31 L. R. A. 382, 53 Am. St. Rep. 825), it was said: "All the authoritites agree that 'due process of law' requires that a person shall have reasonable notice and a reasonable opportunity to be heard before an impartial tribunal before any binding decree can be passed affecting his right to liberty or property." Yet it was further said in that case that, while the Legislature cannot dispense with notice altogether, it may prescribe the kind of notice. There the city's charter provided for no notice whatever, and therefore the ordinance of the city, under which it was attempted to fix a charge upon the property of the appellants to meet the cost of paving the streets, was held unconstitutional and void.

Section 3225 of the Code of 1904, under review, applies to all corporations doing business in this state, except certain mentioned corporations, and the purpose of the Legislature seems clearly to have been to provide against hardships arising where corporations go into various sections of the state, making contracts and carrying on their business, and then leave without closing the same satisfactorily, and thereby compelling litigants to follow them perhaps across the entire state to litigate even small matters, or abandon their claims. Any lawful business which may be conducted by an individual may be conducted by a corporation chartered under the laws of the state, and it is a matter of common knowledge that there are many of these corporations which, while having a home office at some point in the state, through their agents and others transact business and contract debts and incur liabilities in many sections of the state. It may be, as suggested by the learned counsel for plaintiff in error, that under this statute a domestic corporation domiciled in Norfolk, Va., wishing to obtain a judgment against another domestic corporation domiciled in the same city upon some cause of action, real or fictitious, and desiring to keep from the defendant corporation knowledge that a suit was being prosecuted against it, might go to Highland county and institute its suit, and making the affidavit required by statute, which it might truthfully do within the limits of the statute, and without making oath that its claim was believed to be just, obtain an order of publication,

which, under the statute, if printed once a week for four successive weeks in a newspaper printed in Lee county, however limited its circulation, would yet obtain "a sufficient service of such process." But it is to be borne in mind that, before such proceedings as suggested could be had, there must be jurisdiction in the court in which the proceedings are instituted, under section 3215 of the Code; and it would be a reflection on the judiciary of this state to say that judgment could be obtained in any county where jurisdiction is wanting.

Section 3215, supra, provides: "An action may be brought in any county or corporation wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein." And section 3214 provides: "Any action at law, if it be to recover a loss under a policy of insurance, either upon property or life, may be brought in any county or corporation wherein the property insured was situated at the date of the policy, or the person whose life was insured resided at the date of his death or at the date of the policy." It was under this latter section that this court, in Wytheville Ins. Co. *v.* Stultz, *supra*, held that the publication of the summons, as provided by section 3225, was a good and valid service of notice to the defendant.

Prof. Lile, in his Notes on Corporations, p. 342, discusses the statute and explains it fully, showing the difference between domestic and foreign corporations. As he shows, when the action is against a domestic corporation, the summons is published and made returnable to rules, and not to appear in 15 days, as in other cases. He makes no suggestion of a question as to the constitutionality of the statute.

The late Judge Burks, in an article appearing in 2 Va. L. Reg. p. 545, reviews the statutes providing for the summoning of corporations by publication, but makes no suggestion of a doubt as to the constitutionality of section 3225, here in question. He calls attention to the differences in the requirements of section 3230 and the three sections following, and the provision of section 3225, and shows that the sections other than the last named do not apply to corporations, and clearly indicates an opinion that, where the provisions of section 3225 are complied with, the defendant corporation is duly summoned.

That hardships may arise out of the execution and enforcement of this statute is very probable; but the courts of the state cannot, for the reason only, declare a statute unconstitutional; "nor can a court declare a statute unconstitutional and void solely on the ground of unjust or oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution." Cooley's Const. Lim. (6th Ed.) 197.

"It is true," says this learned author, "there are some reported cases in which judges have been understood to intimate a doctrine different from what is here asserted; but it will generally be found, on an examination of those cases, that what is said is rather by way of argument and illustration to show the unreasonableness of putting upon Constitutions such a construction as would permit legislation of the objectionable character then in question, and to induce a more cautious and patient examination of the statute, with a view to discover in it, if possible, some more just and reasonable legislative intent, than as laying down a rule by which the courts would be at liberty to limit, according to their own judgment and sense of justice and propriety, the extent of legislative power in directions in which the Constitution had imposed no restraint." On page 200 the same author further says: "The rule of law upon this subject appears to be that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being prima facie valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the Constitution, and the case shown to come within them."

In 8 Cyc. 778, it is said that the generally accepted rule is that the courts will not declare a statute void merely because, in their opinion, it is opposed to the spirit supposed to pervade the Constitution.

And in Calder *v.* Bull, 3 Dall, 386, 1 L. Ed. 648, the court said: "When Congress or a State Legislature pass a law within the general scope of their constitutional power, the courts cannot pronounce it void merely because in their judgment it is contrary to the principles of natural justice, and the great weight of authority favors the rule laid down in this case."

Among the authorities relied on by counsel for plaintiff in error as supporting the contention that section 3225 of the Code does not meet the constitutional requirement of "due process of

law" is the case of Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565, but in that case the court was dealing with foreign, and not domestic corporations, and neither in that case nor in any other that we have been able to find was it held that the Legislature has not the right to prescribe a mode of service where the statute has no extraterritorial effect. On the contrary, the authorities are in accord with what was said by this court in Violett *v.* Alexandria, supra, that, while the Legislature cannot dispense with notice altogether, it may prescribe the kind of notice. With the wisdom of the statute the courts have nothing to do, and it may be that the mode of service prescribed might have been different and for the better, in that it would have been more effective and better calculated to arrest the attention of a defendant against whom the summons published is directed, or, as in an action against an insurance company created by the laws of this state, where the statute, although the action may be brought in the county or corporation wherein the property insured was situated at the date of the policy, or the person whose life was insured resided at the date of his death or at the date of the policy, requires that process or notice shall be directed to the sheriff or sergeant of the county or corporation wherein the chief office of such company is located. But these are matters for legislative consideration, and not for the determination of the courts.

Constructive service of a summons or a notice, as authorized by the statutes, has over and over been recognized as a valid service and a reasonable exercise of legislative authority, and we can see no reason why the mode of service provided in section 3225, which was strictly followed in this case, should be regarded as either lacking "due process of law" or the reasonable exercise of legislative authority.

We are therefore of opinion that the judgment of the circuit court must be affirmed.

Affirmed.

Note.

The decision in this case, upholding the constitutionality of the statute in Virginia allowing service of process on domestic corporations by publication, is in our opinion clearly correct; besides it is the first attack on its constitutionality though, as the court said, it "has been in force nearly a quarter of a century."

It is well settled, as decided in the principal case, that a corporation, whether foreign or domestic, is a person within the meaning of the 14th amendment of the United States constitution providing that "no state shall deprive any person of life, liberty, or property without due process of law." 66 Central Law Journal 109, citing Sam Mates County *v.* Ry. Co., 13 Fed. Rep. 722; Pembina, etc., Mining Co. *v.* Pennsylvania, 125 U. S. 181, 31 L. Ed. 650 Santa Clara Co. *v.* Southern Pac. R. Co., 118 U. S. 394, 30 L. Ed. 118, 24 Am. & Eng. R. Cas. 523; Minneapolis, etc., Ry. Co. *v.* Beckwith, 129 U. S. 26, 32 L. Ed. 585; 1 Cook Cor. 4th Ed., § 15a; Smyth *v.* Ames, 169 U. S. 466, 42 L.

Ed. 819; Charlotte, C. & A. Ry. *v.* Gibbes, 142 U. S. 386, 35 L. Ed. 1051; Gulf, Colorado & Santa Fe Ry. *v.* Ellis, 165 U. S. 150, 41 L. Ed. 666; Pinney *v.* Providence, L. & I. Co. (Wis.), 82 N. W. 308, 50 Cent. L. J. 343; State *v.* St. Marys, etc., Petroleum Co., 61 Cent. L. J. 468; Covington & L. Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 41 L. Ed. 560; Blake *v.* McClung, 172 U. S. 240, 43 L. Ed. 432.

It was stated broadly in The LaFayette Ins. Co. *v.* French, 18 How. 404, 408, that "process can be served on a corporation only by making service thereof on some one or more of its agents. The law may, and ordinarily does, designate the agent or officer on whom process is to be served. For the purpose of receiving such service, and being bound by it the corporation is identified with such agent or officer. The corporate power to receive and act on such service, so far as to make it known to the corporation, is thus vested in such officer or agent."

But in a learned article in 66 Cent. Law Journal, in which the writer goes at length into this question, it is said; first, as to service by publication on Foreign Corporations.

"It would seem that, even under the rule suggested in LaFayette Ins. Co. *v.* French, that a statute providing for service, upon foreign corporations doing business in the state, by publication would be valid, provided such service was authorized only in cases where no agent or officer was to be found within the jurisdiction; for this form of service could hardly be regarded as contrary to the 'principles of natural justice.' However, the only direct decisions the writer has been able to find hold, that it is not competent for a state to authorize such service. The Supreme Court of South Carolina has so decided in several cases (Tillinghast *v.* Boston, D. R. L. Co.; Moore *v.* S. C. Forsaith Machine Co., 39 S. C. 484, 18 S. E. 120, 22 L. R. A. 49; Toms *v.* Richmond & D. R. Co., 40 S. C. 523, 19 S. E. 142; Pepper *v.* Shearer, 48 S. C. 493, 26 S. E. 797), but its decisions were apparently reached without reference to the doctrine of consent, for it merely applied the general rule announced in Pennoyer *v.* Neff, 95 U. S. 714, to the effect that jurisdiction to render a personal judgment against non-residents could be obtained only by personal service within the jurisdiction. As we have seen, it is only by virtue of the doctrine of consent that service of any kind can be authorized upon a foreign corporation outside of the state of its organization. And surely it is competent to apply that doctrine to a foreign corporation doing business by mail or otherwise, than through the medium of officers or agents within the state. Would a statute requiring such corporations to consent to service by publication as a condition of their license to do business not be reasonable?"

But as to service by publication on domestic corporations, which is the case at bar, it was said:

"While, as we have seen, the state has much the same power over domestic corporations as it has over foreign corporations doing business within its territory, yet the doctrine of consent has been developed with respect only to foreign corporations. There has been no pressing necessity for its application to domestic corporations for they, without the aid of that doctrine, are as much subject to the process of the courts of the state as are natural persons. Bernhardt *v.* Brown, 36 L. R. A. 402. And the rule sustained by the weight of authority seems to be that residents who conceal themselves or cannot be found within the state may be served in a personal action by publication. Bardwell *v.* Collins, 44 Minn. 97, 9 L. R. A. 152, 46 N. W. 315; Note to Pinney *v.* Providence Loan & Investment Co., 50 L.

R. A. 586, citing Bitancourt v. Eberlin, 71 Ala. 461; Fleming v. West, 98 Ga. 778, 27 S. E. 157; Bimeler v. Dawson, 5 Ill. 536, 39 Am. Dec. 430; Bickerdike v. Allen, 157 Ill. 95, 29 L. R. A. 782, 41 N. E. 740; Sturgis v. Fay, 16 Ind. 429, 79 Am. Dec. 440; Weaver v. Boggs, 38 Md. 255; Harryman v. Roberts, 52 Md. 65; Continental Nat. Bank v. Thurber, 74 Hun, 632, 26 N. Y. Supp. 956; Northcroft v. Oliver, 74 Tex. 162, 11 S. W. 1121; Hinckley v. Kettle River Co., 70 Minn. 105, 72 N. W. 835. In Knowles v. Logansport Gas Light & C. Co., 86 U. S. 58, 22 L. Ed. 70, it is said: 'We do not mean to say that personal service is in all cases necessary to enable a court to acquire jurisdiction of the person. When the defendant resides in the state in which the proceedings are had, service at his residence and perhaps other modes of constructive service may be authorized by the laws of the state.' The reason for denying jurisdiction in personam of nonresidents by publication, is founded in international usage. The comity of states forbids one to extend its jurisdiction into another, and no proceeding that attempts to do so is due process of law unless by the consent of the party proceeded against; but the reason for the rule has no application to residents of the state, and hence by the weight of authority the rule itself is not applicable to them."

Thus it will be seen that there can be little doubt of the constitutionality of this statute when applied to domestic corporations, and according to the opinion of the learned author in the article quoted from it is constitutional also as to service by publication on foreign corporations doing business in the state, because our statute allows such service only where there is no agent in the county or corporation wherein the case is commenced, and further requires affidavit of that fact and of the fact that there is no person in said county or corporation on whom there can be service.

But in New River Mineral Co. v. Seeley, 120 Fed. 193, Judge Brawley, citing Staunton Perpetual B. & L. Co. v. Haden, 92 Va. 201, 23 S. E. 285, said: "The decisions of the Supreme Court of Appeals of Virginia clearly establish the proposition that, where constructive service of process is allowed in lieu of personal service, the terms of the statute by which it is authorized must be strictly followed, or the service will be invalid, and the judgment rendered thereon by default be void."

See note to Moyer v. Bucks, 16 L. R. A. 231.

SMITH et al. v. WHITE et al.

Nov. 21, 1907.

[59 S. E. 480.]

1. Appeal—Disqualification of Judge—Sufficiency of Record.—Code 1904, § 3049, provides that if a judge of any circuit or city court shall consider it improper for him to decide any case or preside at any trial pending therein, unless said case is removed as provided by law, the fact shall be entered of record and certified by the clerk to the Governor, who shall designate another judge to act. Held, that a certified statement of the clerk, appended to the transcript of the record filed with the petition for an appeal, that the fact that a judge was